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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 55

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION.

JOSEPH J. BUNNO,
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New York, Susquehanna and Western Railroad Company

Dated, April 23, 1958.

Parlick Press, Inc., 22 Thames St., New York 6, N. Y. U. S. A.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION.

Appellant Susquehanna* appeals from the final decree of the District Court entered on December 31, 1957 setting aside an order and certificate of public convenience and necessity issued by Commission on June 26, 1957. Sus-

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*Throughout this Statement as to Jurisdiction we will refer to New York, Susquehanna and Western Railroad Company as "Susquehanna"; Erie Railroad Company as "Erie"; United States of America as "United States"; Interstate Commerce Commission as "Commission"; State of New Jersey as "State"; Board of Public Utility Commissioners of New Jersey as "Board"; Brotherhood of Locomotive Engineers as "Brotherhood"; United States District Court for the District of New Jersey as "District Court"; and New York Central Railroad Company as "Central".

quehanna submits this statement in compliance with Rule 13 of the Revised Rules of the Supreme Court of the United States to show the basis upon which the Supreme Court has jurisdiction on appeal to review said judgment of the District Court, and that the questions presented are substantial.

Erie has filed in this Court, on April 11, 1958, its Statement as to Jurisdiction bearing Docket No. 918. Since the cause in the District Court was a single action (Civil No. 802-57), in which Susquehanna and Erie were both parties defendant, and the same record was used, leave is respectfully requested, upon Susquehanna's appeal, to use that record which has already been filed by Erie. For the same reason, leave is respectfully requested to refer in this brief to the decrees and opinions which are Appendices A to F in Erie's Statement.

Opinions Below.

The opinion of the District Court in the above entitled matter is reported in 158 F. Supp. 104, and is printed as Appendix A to Erie's Statement. The final decree in that cause is printed as Appendix F to Erie's Statement.

The opinion of the Commission accompanying the issuance of the order and certificate of public convenience and necessity is reported in 295 I. C. C. 549; and its opinion denying the motion of State and Board for reconsideration and rehearing is reported in 295 I. C. C. 599. Copies of said opinions are annexed as Appendices C and D respectively to Erie's Statement.

In its opinion in the instant case, the District Court referred to its findings and determination in a companion case relating to the proposed abandonment by Central of its ferries between Weehawken, New Jersey, and New

York City, New York. The latter opinion is reported in *Board of Public Utility Comm. of N. J.* v. *United States*, 158 F. Supp. 98, and is printed as Appendix B to Erie's Statement.

Jurisdiction.

This suit was brought under 28 U. S. C. Sections 1336, 1398, 2284, 2321-2325 and 5 U. S. C. Section 1009 by State and Board to set aside an order and certificate of Commission authorizing Erie to abandon its passenger ferry line across the Hudson River between Jersey City, New Jersey, and Chambers Street, New York City, New York, and authorizing abandonment of use under contract of said ferry by Susquehanna. The final decree of the District Court annulling the Commission's order and certificate was dated December 30, 1957, and entered on December 31, 1957. Susquehanna's notice of appeal was filed in that Court on February 27, 1958. The jurisdiction of the Supreme Court to review this decree by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). *Allegheny Corporation* v. *Breswick & Co., et al.*, 353 U. S. 151 (1957); *Morey* v. *Doud*, 354 U. S. 457 (1957).

Questions Presented.

1. Whether Susquehanna's proposed abandonment of the use under contract of the passenger ferry line operated by Erie between its ferry terminal at the foot of Pavonia Avenue in Jersey City, New Jersey, and its ferry terminal at the foot of Chambers Street, New York City, New York, respectively, is an abandonment of a portion of a line of railroad which the Interstate Commerce Commission has jurisdiction to authorize under Section 1(3) and Sections 1(18-20) of the Interstate Commerce Act (49 U. S. C., §1[3] and §§1[18-20]).

2. Whether the Interstate Commerce Commission had jurisdiction and authority under the foregoing statutes to issue its certificate dated June 26, 1957 in its Finance Docket No. 19351 that public convenience and necessity permit abandonment of use under contract by Susquehanna of Erie's passenger ferry line across the Hudson River between Jersey City, New Jersey, and Chambers Street, New York City, New York.

3. Whether the evidence in the record before the Interstate Commerce Commission is sufficient to sustain its certificate dated June 26, 1957, that public convenience and necessity permit the abandonment by Susquehanna of its use of said interstate passenger ferry line.

Statutes Involved.

The Statute primarily involved is Section 1(18) of the Interstate Commerce Act which provides that:

> "* * * no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Section 1(3)(a) of the Interstate Commerce Act (49 U. S. C. §1[3][a]) defines the term "railroad" to include "ferries used by or operated in connection with any railroad."

The relevant portion of Section 1(3)(a) of the Interstate Commerce Act and the provisions of Sections 1(18-20) and (22) of said Act are set forth in Appendix E to Erie's Statement.

Statement.

Erie operates an interstate railroad ferry line for passengers across the Hudson River between Jersey City, New Jersey, and Chambers Street, New York City, New York. Susquehanna uses such ferry for transportation of its passengers pursuant to contract with Erie. Since Erie had requested authorization from the Commission to abandon operation of this passenger ferry line, Susquehanna was required to file an application to abandon its contractual use thereof (Appendix C to Erie's Statement, pp. 44-5).

The Commission found that:

1. During the years 1953, 1954, and the first nine months of 1955 respectively, operation of the ferry resulted in net annual deficits of $1,247,765, $1,000,912 and $721,433 (*ibid.*, p. 49).

2. Susquehanna's financial condition did not permit it to institute and operate ferry service (*ibid.*, p. 44).

3. Adequate substitute service is available to Susquehanna's passengers now using the ferry service via:

a. Hudson & Manhattan Railroad to Hudson Terminal in downtown Manhattan (*ibid.*, pp. 51-2); and

b. A contract bus service from a station known as Susquehanna Transfer, about five miles north of Jersey City, which transports passengers to the Port Authority Bus Terminal in midtown New York (*ibid.*, p. 52).

The Commission also found:

> "The record clearly shows that the ferry terminals, vessels and other passenger facilities and services of Erie are maintained physically separate from the car float and lighterage equipment and

other facilities used in the transporting of freight across the Hudson River and that the routes of the water freight service are entirely different from the route of Erie's Chambers Street ferry line. The ferry service and the lighterage service is therefore analogous to two extensions of lines of railroad, one of which is used exclusively to transport passengers and the other used exclusively to transport freight. Abandonment of all passenger operations over the extension used exclusively in transporting passengers in such circumstances amounts to a complete abandonment of a line of railroad for which our authorization is required under section 1(18)." (Appendix D to Erie's Statement, p. 65).

On the basis of the foregoing findings, the Commission authorized Erie to discontinue the operation of the ferry, and Susquehanna to discontinue its contractual use thereof. State and Board filed a complaint in the District Court to set aside the Commission's order and certificate of public convenience and necessity. Erie and Susquehanna were given leave to intervene as defendants.

On December 10, 1957, the District Court rendered its decision annulling the Commission's certificate and permanently enjoined the Commission from permitting it to become effective. The District Court rested its decision on the single ground that the Commission did not have jurisdiction to grant Erie's application. Its holding was that a complete termination of Erie's ferry operations did not constitute an abandonment under Section 1(18), but would merely be a partial discontinuance of service over which the Commission had no jurisdiction.

The Questions Presented are Substantial.

A. The Jurisdictional Issues.

The jurisdictional questions presented by this appeal are identical with those presented on Erie's appeal (Docket No. 918), and substantially similar to those presented by Central's appeal (Docket No. 838). These substantial questions of Federal jurisdiction are squarely presented because the effect of the District Court's decision is to:

a. Modify, if not set aside entirely, the Commission's 36-year old determination under Section 1(18) of the Interstate Commerce Act that it has jurisdiction over all abandonments of interstate railroad passenger ferry lines.

b. Constrict the jurisdiction of the Commission over interstate commerce in opposition to the basic philosophy of the Transportation Act of 1920.

1. Commission's interpretation of Section 1(18).

The Commission was given control over the extension and abandonment of all or any portion of a line of railroad, including ferries, by the Transportation Act of 1920. 49 U. S. C. §1(3)(a)(18 to 20) and (22). The Commission was first called upon to exercise jurisdiction under these statutes in connection with the abandonment of a ferry line (1922). Since that time at least twenty other applications have been made to the Commission by railroads for permission to abandon ferry lines. In each instance the Commission assumed jurisdiction of the subject matter. In at least four of the cases, Commission jurisdiction was questioned by one or more parties. These cases are all cited in Erie's Statement (pp. 13-14) and need not be repeated here. See also, *Claiborne-Annapolis Ferry Co.*

v. *United States,* 285 U. S. 382 (1932); *Railway Comm.* v. *Southern Pacific Ry. Co.,* 264 U. S. 331 (1923); *Atchison Ry.* v. *Railroad Comm.,* 283 U. S. 380 (1931); *I. C. C.* v. *Los Angeles,* 280 U. S. 52 (1929).

2. District Court's decision is contrary to the intention of Congress.

This Court has held that, in keeping with the National Transportation Policy of Congress, the Transportation Act of 1920 should be broadly construed in favor of vesting the Commission with jurisdiction over all phases of interstate transportation. *Texas & Pacific R. Co.* v. *Gulf, etc. Ry.,* 270 U. S. 266, 277 (1926).

Conclusion.

The questions presented by this appeal are substantial. We respectfully ask that probable jurisdiction be noted.

Respectfully submitted,

JOSEPH J. BIUNNO,
Attorney for Appellant,
New York, Susquehanna and
Western Railroad Company.

Dated, April 23, 1958.